Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition of the State of Minnesota, Acting by and through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport capacity in State Freeway Rights-of-Way.	)	CC Docket No. 98-1

COMMENTS OF GTE

GTE Service Corporation and its affiliated domestic telephone operating, wireless, long distance, Internet access and video companies

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SUMMARY

Section 253 of the 1996 Act expressly requires the Commission to remove any state or local legal mandate that "prohibits or has the effect of prohibiting" an entity from providing any interstate or intrastate telecommunications service. The exclusive access contractual agreement entered into by Minnesota with a state-sanctioned consortia clearly violates Section 253(a) and is not saved by Sections 253(b) or (c). As such, the Commission must exercise its preemptive authority and invalidate the arrangement proffered by Minnesota, as required by Section 253(d).

Two GTE entities are providing, or plan to provide, telecommunications services in Minnesota, one as an incumbent local exchange carrier and the other as a competitive local exchange carrier. Minnesota's exclusive contract with the consortia has the effect of prohibiting both GTE's ILEC and CLEC affiliates from providing telecommunications service in a variety of ways. The anticompetitive effects of the exclusive contract suffered by GTE are also suffered by all other putative telecommunications providers in Minnesota. Therefore the proposed contract runs afoul of Section 253(a).

The proposed contract is not saved by Section 253(b) because it is not competitively neutral. Specifically, the very purpose of the exclusive contract is to foreclose all other potential providers from the equivalent use of the finite freeway rights-of-way resource. Minnesota's attempted conferral of exclusive rights on the consortia places GTE and all the other potential telecommunications providers at an indisputable competitive disadvantage.

The proposed contract is also not save by Section 253(d) because it constitutes neither right of way management on a competitively neutral and nondiscriminatory basis nor does it purport to compensate the state on a competitively neutral and nondiscriminatory basis. Specifically, the essence of the proposed contract is the bartering of exclusive right-of-way use by Minnesota in exchange for the provision of fiber optic capacity by the consortia. This arrangement clearly evidences Minnesota's abdication of whatever right-of-way management authority it might have in return for the monetary benefit of the consortia's fiber capacity.

Since the exclusive arrangement proffered by Minnesota violates Section 253(a), and is not saved by Sections 253(b) or 253(c), the Commission is required to exercise its preemptive authority by Section 253(d).

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COMMENTS OF GTE

GTE Service Corporation and its affiliated domestic telephone operating,[1] wireless,[2] long distance,[3] Internet access[4] and video companies[5] (collectively, "GTE"), respectfully submits these Comments in response to the Commission's Public Notice ("*Notice*"), DA 98-32, released January 9, 1998, requesting comment in the above-

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1 GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Hawaiian Tel International Incorporated. These Comments are also filed on behalf of GTE's competitive local exchange carrier, GTE Communications Corporation.

2 GTE Mobilnet Incorporated, Contel Cellular Inc. and GTE Airfone Incorporated.

3 GTE Communications Corporation, Long Distance division.

4 GTE Internetworking, GTE Intelligent Network Services

5 GTE Media Ventures Incorporated.

captioned docket.[6] As set forth below, GTE opposes the State of Minnesota's bald attempt to expropriate the public rights-of-way for the exclusive use of a state-sanctioned consortia for up to twenty years as patently inconsistent with the Telecommunications Act of 1996.[7] Because of the egregious nature of Minnesota's proposal, the Commission should expeditiously exercise its preemptive authority under Section 253 and reject Minnesota's request for a declaratory ruling.

I. INTRODUCTION.

Minnesota's request for a declaratory ruling concerns its execution of an exclusive contract which grants the state's more than 1000 miles of freeway rights-of-way use to a private provider of fiber optic cable for up to twenty years. This usurpation of the public rights-of-way by a state-sanctioned consortia was given in

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[6] GTE offers these comments in response to the *Notice* but nowhere concedes that Minnesota's proposal is permissible even under applicable state law. To the contrary, the exclusive arrangement which Minnesota proposes flies in the face of Minn. Stat. § 237.163(1) which provides, in pertinent part, that:

> "The legislature finds, and establishes the principle that, it is in the state's interest that the use and regulation of public rights-of-way be carried on in a *fair, efficient, competitively neutral, and substantially uniform manner*, while recognizing such regulation must reflect the distinct engineering, construction, operation, maintenance and public and worker safety requirements, and standards applicable to various users of public rights-of-way..."

(Emphasis added.)

[7] Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C.§ 153 *et seq.* (the "1996 Act"). As used herein, the "Act" refers to the Communications Act of 1934, as amended by the Telecommunications Act of 1996.

exchange for the transfer to Minnesota of a 20% ownership in the completed route's fiber facilities capacity, purportedly to be used for Minnesota's private network.

According to its petition, Minnesota has awarded the exclusive contract for the public rights-of way to a consortia comprised of two firms.[8] Minnesota contends that the exclusive contract is competitively neutral and nondiscriminatory because: (1) the consortia will install fiber capacity owned by third parties concurrent with the installation of its own fiber; and (2) the consortia will make the capacity of the completed system available through purchase and/or lease to other interested telecommunications services providers in the state. *Petition*, at 4. Minnesota attempts to support its petition by alleging that the exclusive contract will: (1) improve the state's telecommunications capabilities; (2) reduce the state's telecommunications costs (including the cost of developing intelligent transportation system, or "ITS"); (3) provide additional fiber optic telecommunications capacity to rural areas; (4) increase competition for telecommunications services through the creation of additional wholesale transport capacity; and (5) protect the safety and convenience of the traveling public. *Petition*, at 2-3. Whether taken together or separately, these *post hoc* justifications cannot excuse Minnesota's arrogation of the public rights-of-way to the exclusion of a myriad of existing and future telecommunications providers. More to the point, Minnesota's actions are in direct contravention of Section 253 of the Act.

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[8] ICS/UCN LLC and Stone & Webster Engineering Corp. *Petition*, at 1.

II. IF A LAW, REGULATION OR OTHER LEGAL REQUIREMENT VIOLATES SECTION 253(a), AND IS NOT SAVED BY SECTION 253(b)/(c), THEN THE COMMISSION MUST PREEMPT THE LAW, REGULATION OR LEGAL REQUIREMENT IN ACCORDANCE WITH SECTION 253(d).

The Commission has already set forth a process for conducting reviews of state or local government's statutes, regulations or legal requirements as they may be applied under Section 253. Section 253(a) bars states and their political subdivisions from enforcing statutes, regulations and other legal requirements (including contractual arrangements[9]) which prohibit, *or have the effect of prohibiting*, the ability of a putative carrier to provide any interstate or intrastate telecommunications service.

> "No state or local statute or regulation, or other state or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

47 U.S.C. § 253(a).

In determining whether its preemptive authority is triggered under Section 253, the Commission first reviews a suspect law, regulation or other legal requirement (including contractual arrangements) to determine whether there is a violation of subsection 253(a). If a violation exists, then a review is conducted under subsections 253(b) and/or (c) to determine whether the violation is otherwise permissible. If the violation is not permitted under subsections 253(b) or (c), then the Commission is obligated to preempt the offending statute, regulation or legal requirements in accordance with subsection 253(d).

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[9] In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Docket No. CCB Pol 96-26, *Memorandum Opinion and Order*, 12 FCC Rcd 14191 (1997) ("*Huntington Park*").

> "[W]e first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), *we must preempt* the enforcement of the requirement in accordance with section 253(d)."
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> * * *
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> "With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement ... must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c). We will exercise our authority only upon such fully developed factual records."

TCI CableVision of Oakland County, Inc., Docket No. CSR-4790, *Memorandum Opinion and Order*, FCC 97-331 (released September 19, 1997) ("*Troy, Michigan*"), at paras. 42, 101 (emphasis added).[10]

Minnesota's own admissions in its petition provide all the "credible and probative evidence" which the Commission needs to determine that Section 253 preemption is mandated in the instant case. While Minnesota purports to justify the exclusive contract under subsections (b) and (c), Minnesota's expropriation of the public rights-of-way for a state-sanctioned consortia clearly runs afoul of Section 253.

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[10] See also In the Matter of Silver Star Telephone Co., Docket No. CCB Pol 97-1, *Memorandum Opinion and Order*, FCC 97-336 (released September 24, 1997), at para. 37.

III. MINNESOTA'S ARROGATION OF THE PUBLIC RIGHTS-OF-WAY FOR THE BENEFIT OF A SINGLE PROVIDER, AND TO THE EXCLUSION OF ALL OTHER EXISTING AND POTENTIAL TELECOMMUNICATIONS PROVIDERS, VIOLATES SECTION 253(a).

There is little doubt that the exclusive contract which Minnesota proffers unquestionably violates Section 253(a). Specifically, the exclusive contract, *at the very least*, "ha[s] the effect of prohibiting the ability of [other potential telecommunications entities from] provid[ing] ... interstate or intrastate telecommunications service."

Two GTE entities are providing, or plan to provide, telecommunications services in Minnesota, one as an incumbent local exchange carrier and the other as a competitive local exchange carrier.[11] Minnesota's exclusive contract with the consortia *has the effect of prohibiting* both GTE's ILEC and CLEC affiliates from providing telecommunications service in a variety of ways, for example:

- GTE's ILEC and CLEC affiliates are required to determine whether to place their own facilities in accordance with the consortia's construction schedule, which is very unlikely to bear any relationship to the market conditions which would otherwise drive the placement of GTE facilities.
- If GTE's ILEC and CLEC affiliates fail to place their facilities in accordance with the consortia's construction schedule, they will be relegated to leasing facilities over which the consortia has absolute monopoly control.

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[11] Contel of Minnesota, Inc. d/b/a GTE Minnesota is an incumbent local exchange carrier (an "ILEC") (*see* 47 U.S.C. § 251(h)(1)(A)) and GTE Communications Corporation has filed for competitive local exchange carrier ("CLEC") status.

- If GTE cannot obtain access, whether because of the consortia's construction schedule or otherwise, GTE's obligation to provide ubiquitous service as a carrier of last resort, which survives both the 1996 Act and competitive changes in Minnesota law,[12] will clearly be impaired.
- If forced to lease facilities, the lease charges may bear no relationship to what the market would otherwise charge for such facilities in a competitive environment. In other words, granting an exclusive right to one entity gives that entity significant control over the pricing of fiber optic capacity that would not otherwise exist under normal competitive market conditions. The result will be higher prices for fiber optic capacity dictated by artificial constraints as opposed to competitive forces. The burden of these higher prices will be paid for by those entities that are entering the market after the initial placement of the fiber facilities.

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[12] In 1933 and 1939, the Minnesota Supreme Court held that local exchange utilities/ILECs were expressly obligated to serve all requesting members of the general public located in their respective service territories. *Western Buse Telephone Co. v. Northwestern Bell Telephone Co.*, 248 N.W. 220 (1933); *State v. Tri-State Telephone & Telegraph Co.*, 284 N.W. 294 (1939). On June 19, 1997, the Minnesota Commission adopted new local competition rules which did not alter an ILEC's carrier of last resort obligations. Minn. Rule 7812.0600(3) provides: "...The obligation to provide facilities-based services does not require an LSP [local service providers--ILECs and CLECs] that is not an eligible telecommunications carrier (ETC) to build out its facilities to customers not abutting its facilities or to serve a customer if the local service provider cannot reasonably obtain access to the point of demarcation on the customer's premises." *See also* Minn. Rule 7812.1400(1), which automatically designates ILECs as ETCs.

- If GTE's ILEC or CLEC affiliates build facilities, they will incur substantial additional charges by being required to indirectly route facilities avoiding the public rights-of-way now exclusively dedicated to the consortia.
- Minnesota permits local municipalities to offer telecommunications services.[13] As such, the consortia can be expected to be biased in favor of these entities in terms of granting access to the right-of-way in order to obtain favorable treatment in the municipalities' granting of right-of-way access.

The anticompetitive effects of the exclusive contract suffered by GTE are also suffered by all other putative telecommunications providers in Minnesota. Moreover, Minnesota's assertion that Section 253(a) somehow does not apply to the deployment of facilities is wholly without merit. *Petition*, at 4, 13-17. The test is not what particular impediment to competition the state erects, but whether the impediment *has the effect of* prohibiting the provision of telecommunications services. 47 U.S.C. § 253(a). Minnesota's strained and utterly unpersuasive reading of the statute has already been (at least) implicitly rejected by the Commission on three separate occasions, each of which make clear that restrictions on the deployment of facilities clearly are subject to Section 253 preemption.[14]

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[13] In the Matter of Moorehead Public Service's Application for Authority to Provide Local Niche Service, Docket No. P-5564/NA-97-1390, Order granting application (February 23, 1998).

[14] Public Utility Commission of Texas, Docket No. CCB Pol 96-13, *Memorandum Opinion and Order*, FCC 97-346 (released October 1, 1997) ("*Texas PUC*"), at para. 13 (respecting restrictions on the deployment of the "facilities through which a

Similarly, Minnesota's assertion that Section 253(a) does not apply to freeway rights-of-way is without merit. *Petition*, at 21. Nothing in the language of the statute, nor in the legislative history, even vaguely suggests that a state's particular choice of entry barrier is pertinent. Rather, the statute's (and the Commission's) focus is upon the effect of Minnesota's actions. Simply because some (although even Minnesota admits, not all) of the subject rights-of-way have not been previously used by telecommunications carriers, does not somehow exempt prospective restrictions which have the effect of prohibiting competition.

Minnesota's assertion that the exclusive contract is *not intended* to be a barrier to competitive entry, because it actually "enhance[s] .. the competitive environment", fares no better. *Petition*, at 19. The test established by Section 253(a) turns not upon the state's *subjective intentions*, but upon the *effect of its actions.*[15] As outlined above, the provisions of the exclusive contract undoubtedly will impede and prohibit GTE entities from providing telecommunications services in Minnesota.

Finally, Minnesota's assertion that the wholesale "carrier's carrier" facilities to be deployed by the consortia are not telecommunications services thereby subject to

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party is permitted to provide service"); *Huntington Park* (respecting restrictions on the deployment of payphones); *Troy, Michigan* (respecting restrictions on the deployment of cable television facilities).

[15] While Minnesota's subjective intent is irrelevant, the *bona fides* of Minnesota's assertion in this respect are nonetheless suspect. Certainly, the granting of an exclusive arrangement to the consortia enabled Minnesota to demand a substantial stake in the deployed facilities. Having thus exacted its thirty pieces of silver from the consortia by prohibiting competition from all others, Minnesota can hardly be heard to claim that its stake in the venture is not blood money.

Section 253(a) is beside the point. *Petition*, at 4. It is not the nature of the facilities which the consortia will deploy, or the services which may be provided on them, which is relevant. Rather, it is the *exclusion* of GTE's facilities (and those of every other potential telecommunications provider) from the public rights-of-way which is relevant, and these facilities certainly *will* provide telecommunications services.

IV. THE COMPETITIVE BARRIER TO ENTRY ESTABLISHED BY MINNESOTA'S EXCLUSIVE CONTRACT IS NOT SAVED BY SECTION 253(b)/(c).

Prohibitions that violate Section 253(a) may be permissible if they meet the requirements of Subsections 253(b) or (c). Minnesota's exclusive contract arrangement meets neither statutory test.

A. The Exclusive Contract Does Not Serve Any Purpose Within the Scope of Section 253(b) and Is Not Competitively Neutral.

Subsection 253 (b) provides, in pertinent part, that:

> "[N]othing in this section shall affect the ability of a State to impose or ensure, on a competitively neutral basis, the continued quality of telecommunications services and safeguard the rights of consumers."

Minnesota contends (*Petition*, at 28) that it has satisfied the competitive neutrality test by engaging in an "open and fair" Request for Proposal (RFP) process and then awarding the contract to the proposer most advantageous to Minnesota. To the contrary, this "one time" event of an RFP does not meet the test of competitive neutrality. Simply stated, not all current *or potential future* competitors submitted -- or even *could have* submitted -- bids. Thus, the award to an entity in the limited submitting group, by definition, precludes *all* other putative telecommunications providers which were not (or could not have been) parties to the bid process from

competing on a neutral basis in the awarded areas. Consequently, the exclusive arrangement is *inherently incapable* of being applied in a competitively neutral manner.

Succinctly stated, the RFP process -- and the resulting exclusive contract -- necessarily has a "disparate impact" on the ability of present and potential future competitors in the delivery of telecommunications services to consumers. As is readily apparent from its face, the very purpose of the exclusive contract is to *foreclose all other potential providers* from the equivalent use of the finite freeway rights-of-way resource. Minnesota's attempted conferral of exclusive rights on the consortia places GTE and all the other potential telecommunications providers at an indisputable competitive disadvantage. This result alone negates application of Section 253(b).

B. The Exclusive Contract Arrangement Exceeds the Scope of Right-Of-Way Management Authority Reserved To States Under Section 253(c).

Section 253(c) preserves the traditional authority of the state and local government to manage the public rights-of-way, providing in pertinent part that:

> "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers. on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis ..."

The exclusive contract arrangement proffered by Minnesota fails to meet the test of Section 253(c) because it constitutes neither right of way management on a competitively neutral and nondiscriminatory basis nor does it purport to compensate the state on a competitively neutral and nondiscriminatory basis.

While it is true that states and cities may manage public rights-of-way by "coordination of construction schedules, determination of insurance, bonding and

indemnity requirements, establishment and enforcement of building codes, and keeping tract of the various systems using the rights-of-way to prevent interference between them" (*Petition*, at 29), arrogation of the public rights-of-way to the exclusion of all but a state-sanctioned consortia does not constitute "management" within the meaning of subsection (c). The essence of the consortia's contract is the bartering of exclusive right-of-way use by Minnesota in exchange for the provision of fiber optic capacity by the consortia. This arrangement clearly evidences Minnesota's abdication of whatever right-of-way management authority it might have in return for the monetary benefit of the consortia's fiber capacity. Minnesota justifies this bald exchange by the *non-sequitur* that the contract requires the consortia to provide wholesale fiber transport services at universal, non-discriminatory rates. *Petition*, at 10. This is simply beside the point. It is not the consortia's purported future use of the facilities which fails to satisfy subsection (c), but Minnesota's current discriminatory grant of exclusive use to the consortia.

While the receipt of free fiber capacity for right-of-way use has some similarities to compensation, under subsection (c), any such compensation must be "fair and reasonable" and competitively "neutral and nondiscriminatory." An express grant of exclusive use to a state-sanctioned entity can hardly meet the test of competitive neutrality. To the contrary, Minnesota's dedication of the public rights-of-way to only one competitor (irrespective of the particular market), necessarily precludes all other competitors from like use.

Minnesota's suggestion that payments from third parties to an affiliate of the developer are "nondiscriminatory" payments under Section 253(c) is beside the point.

Petition, at 31. At best, this suggestion confuses the proper role of the state and telecommunications service providers. Specifically, nothing in the language or legislative history of Section 253(c) even vaguely suggests that the 1996 Act empowers state authorities to delegate their right to receive "reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis" to some peculiarly sanctioned provider which would then receive compensation from other providers. Indeed, it is likely that the value of the fiber given to the State in return for the exclusive contract will be passed through to those leasing capacity in the future. This will translate into "payment" to the State for rights of way that, more than likely, will exceed an amount for compensation that is "reasonable" as required by Section 253(c) of the Act.

V. SECTION 253(d) REQUIRES THE COMMISSION TO PREEMPT MINNESOTA'S ATTEMPTED ARROGATION OF THE PUBLIC RIGHTS-OF-WAY TO A SINGLE STATE-SANCTIONED ENTITY IN VIOLATION OF SECTION 253(a).

In accordance with Section 253(d), since the exclusive arrangement proffered by Minnesota violates subsection (a), and is not saved by subsections (b) or (c), the Commission is required to exercise its preemptive authority.

> "If... the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or. legal requirement to the extent necessary to correct such violation or inconsistency."

47 U.S.C. § 253(d). Thus, the Commission has the non-discretionary duty to preempt Minnesota's proffered exclusive contract arrangement with the consortia.

> "[S]ection 253 expressly empowers -- indeed obligates -- the Commission to remove any state or local legal mandate that 'prohibits or has the effect

of prohibiting' a firm from providing any interstate or intrastate telecommunication service."

Texas PUC, at para. 22.

VI. CONCLUSION.

Section 253 expressly requires the Commission to remove any state or local legal mandate that "prohibits or has the effect of prohibiting" an entity from providing any interstate or intrastate telecommunications service. The exclusive access contractual agreement entered into by Minnesota with the state sanctioned consortia does clearly violates Section 253(a) and is not saved by Sections 253(b) or (c). Therefore, the Commission must exercise its preemptive authority and invalidate the arrangement proffered by Minnesota.

Respectfully submitted,

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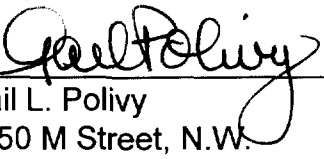
By 

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